

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

UNITED STATES OF AMERICA,)	
)	
v.)	Criminal No. 1:07CR209 (TSE)
)	
WILLIAM J. JEFFERSON,)	
)	
Defendant.)	

**REPLY IN SUPPORT OF MOTION FOR ALTERNATIVE
SERVICE OF TRIAL SUBPOENA ON JENNIFER DOUGLAS ABUBAKAR
AND FOR RECONSIDERATION OF REQUEST FOR RULE 15(a) DEPOSITION**

**A. The Defense Should Be Permitted to Use Alternative Methods to
Serve a Trial Subpoena on Jennifer Douglas Abubakar.**

In its response to Mr. Jefferson's motion, the government admits that alternative methods of service under Rule 4(f)(3) of the Federal Rules of Civil Procedure – specifically including international express mail and e-mail – are appropriate means of serving a trial subpoena issued under 28 U.S.C. § 1783. The government provides a current work address and e-mail address for Jennifer Douglas Abubakar in Dubai, in the United Arab Emirates. The government acknowledges that service of a subpoena by mail and e-mail on Mrs. Abubakar at the addresses it has provided, coupled with service on her U.S.-based attorneys and service through Mrs. Abubakar's foundation in Nigeria as suggested by the defense, would constitute effective service. The defense is willing, with the court's approval, to use these methods of service. This should resolve this issue.

Nevertheless, the government asserts that the defendant should be required to make an additional attempt at personal service on Mrs. Abubakar in Dubai before being permitted to use the alternative methods it has suggested. But the government offers no cogent reasons for asking the court to impose this requirement. It argues only that the court has the discretion to require

that reasonable attempts at personal service be made, and, in a derogatory and condescending tone, claims that the defense's actions have not been sufficient. The government's argument is contradicted by the facts.

While the case law indicates that the court in its discretion *may* require the serving party to show that reasonable efforts at service have already been made, *Williams v. Advertising Sex LLC*, 231 F.R.D. 483, 486 (N.D. W.Va. 2005), *citing FMAC Loan Receivables v. Dagra*, 228 F.R.D. 531, 534 (E.D. Va. 2005), there is no requirement in the rule that such a showing be made.¹ Service by alternative means is as favored as service by the other methods listed in Rule 4(f). *See Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002). It "is neither a 'last resort' nor 'extraordinary relief;'" instead, it is "merely one means among several" of serving process outside of the United States. *Id.* A party "need not have attempted every permissible means of service of process before petitioning the court for alternative relief." *Id.* at 1016. Nothing in Rule 4(f) precludes a party from seeking to use court-approved means of service under Rule 4(f)(3) without having attempted service by any other methods.

More importantly, the defense *did* make reasonable efforts to serve Mrs. Abubakar before filing this motion. Prior to issuance of the Section 1783 subpoena, the defense engaged a process server to serve Mrs. Abubakar personally at her house in Maryland. When that was unsuccessful, the defense requested that her U.S. attorneys accept service or at least provide a current address, which they declined to do. After issuance of the order permitting the Section 1783 subpoena, the

¹ The only authority cited by *FMAC Loan Receivables* for the proposition that a court may require the serving party to show reasonable efforts prior to using alternative means of service is an unpublished opinion from the Western District of New York, *Ryan v. Brunswick Corp.*, 2002 WL 1628933 (W.D.N.Y. May 31, 2002). The *Ryan* court states that although this requirement does not appear in Rule 4(f), "it is necessary in order to prevent parties from whimsically seeking alternative means of service and thereby increasing the workload of the courts." 2002 WL 1628933, at *2.

defense retained counsel in Nigeria to carry out personal service on Mrs. Abubakar there.² The defense also again requested Mrs. Abubakar's U.S. attorneys to accept service; they again declined. Personal service on Mrs. Abubakar was attempted by Nigerian counsel at several addresses. During one of those attempts, the defense learned that although Mrs. Abubakar returned to Nigeria regularly, she was primarily based in Dubai. *See* Ogebe Affidavit, ¶ 7. The defense also learned that Mrs. Abubakar could be contacted by mail or e-mail through her foundation in Nigeria. *Id.* at ¶ 5.³

Although the government belittles these efforts, the fact is that the defense has made multiple attempts to serve Mrs. Abubakar, both personally and through her attorneys, in two different countries, and went to the expense of retaining counsel in Nigeria to assist in this endeavor. Pursuing personal service in Dubai would require the defendant to expend further resources to retain yet another attorney in yet another country, with no guarantee that service could be accomplished, and is unnecessary under the circumstances in any event. Having learned that Mrs. Abubakar can be reached by mail and e-mail, it is entirely reasonable, and well within the standard in *Williams* and *FMAC Loan Receivables*, for the defense to seek court approval to serve Mrs. Abubakar by these less costly and more direct means. Now that the government has provided an additional address for Mrs. Abubakar, the efficacy of the proposed alternative means

² At that time, the defense believed that the wife of the Nigerian Vice President could be found in Nigeria, where she operated a foundation, and it did not have the work address provided in the government's response. Mr. Jefferson's filings relating to the Section 1783 subpoena, including the agreed order related to travel costs, were based on the belief that Mrs. Abubakar was in Nigeria. The government did not then dispute this. *See* Government's Opposition to Defendant's Motion to Take Foreign Depositions (Dkt. # 193), at 11 n. 8 (referring to Mrs. Abubakar's willingness to travel to a deposition from Nigeria).

³ While the government's response attempts to make much of the timing of the defense's attempts at service, those attempts were properly made well before any trial date in this case.

is even more apparent – and not contested by the government. Indeed, it is difficult to determine why the government is demanding that the defense make a third attempt at personal service, unless it is to make it more difficult and expensive for Mr. Jefferson to obtain exculpatory evidence from Mrs. Abubakar.⁴

Accordingly, Mr. Jefferson respectfully submits that the court should enter an order permitting him to serve Mrs. Abubakar by e-mail and mail through the Gede Foundation and at the address identified by the government in Dubai, and by service on her U.S. attorneys.

B. Under the Unique Circumstances of This Case, the Defense Should Be Permitted to Depose Mrs. Abubakar.

The government persists in describing Mr. Jefferson's request for permission to depose Mrs. Abubakar in Europe as if it were an effort to "reward" Mrs. Abubakar for refusing to appear at trial. The government's response also focuses on Mrs. Abubakar's status as a naturalized citizen of the United States and the responsibilities that go along with that status. But Mrs. Abubakar's conduct is not at issue in this motion – Mr. Jefferson's ability to obtain evidence for his defense is. The determinative question under Rule 15(a) is whether the interests of justice require that Mr. Jefferson be permitted to preserve Mrs. Abubakar's testimony by deposition, for use if she does not appear at trial.

Mrs. Abubakar is a critical witness for the defense in this case. Paragraph 101 of the indictment alleges that Mr. Jefferson had a conversation with Mrs. Abubakar in which he discussed paying a bribe to her husband, Atiku Abubakar, then the Vice President of Nigeria, in return for assistance to the telecommunications business using iGate technology: "On or about

⁴ As has been discussed in Mr. Jefferson's prior papers and is further detailed below, by the government's own report, Mrs. Abubakar's testimony would directly contradict a key allegation in the indictment.

June 7, 2005, in Washington, D.C., Defendant JEFFERSON met with [Atiku Abubakar]'s Spouse . . . and expressed his willingness to provide things of value to [Atiku Abubakar] in return for [Atiku Abubakar] assisting the Nigerian Joint Venture.” Ind., ¶ 101.

There were no other participants in or witnesses to this conversation besides Mrs. Abubakar and Mr. Jefferson, and the conversation was not recorded. By the government’s own report, Mrs. Abubakar’s testimony would directly contradict the indictment’s version of this meeting. In its *Brady* letter, the government disclosed that during her grand jury testimony, Jennifer Abubakar “denied that [Mr. Jefferson] talked to her about his interest in paying her husband money.” Feb. 7, 2008 letter at 3. Mrs. Abubakar’s testimony would eviscerate the factual underpinning for the government’s allegation.

It is plainly in the defense’s interest for Mrs. Abubakar to be present at trial, so that the jury could hear live testimony refuting the government’s bribery and conspiracy allegations. The defense’s actions – which include going to the expense of retaining counsel in Nigeria to try to serve a trial subpoena on Mrs. Abubakar there – are consistent with this interest. But for the reasons set forth in Mr. Jefferson’s previous papers, there are serious grounds for concern about whether Mrs. Abubakar will appear at trial even if served. Given this uncertainty, the importance of her testimony, and the professed willingness of Mrs. Abubakar to appear at a deposition, the interests of justice in this unusual case will be best served if Mr. Jefferson is permitted to depose her in order to preserve her testimony. Moreover, the government will not be unfairly prejudiced by allowing a deposition to go forward. At a deposition, the government will be able to cross-examine Mrs. Abubakar under oath, and likely at greater length than it would be able to at trial. Although the deposition testimony would presumably be admissible in the defense’s case

at trial only if Mrs. Abubakar does not appear, it would still be available for use by the government on cross if she does appear.

Although the defense has not found any cases allowing depositions on facts identical to those here, the Rule 15(a) principles set forth in *United States v. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993), support Mr. Jefferson's request. The *Drogoul* court recognized that a "substantial likelihood" that the witness will not testify at trial is sufficient to establish unavailability for purposes of Rule 15(a). 1 F.3d at 1553. "In that situation, justice usually will be served by allowing the moving party to take the deposition, thereby preserving the party's ability to utilize the testimony at trial, if necessary." *Id.* Moreover, as the court in *Drogoul* further explained,

[U]navailability is not the focus *per se* of Rule 15(a). Unavailability is required for *use* of the depositions at trial. Fed.R.Crim.P. 15(e). All that is necessary to *take* depositions is a showing that "exceptional circumstances" exist and that justice would be served by preserving the deposition testimony.

Id. at 1557 (emphasis original).

The *Drogoul* court allowed the government to take depositions of foreign nationals whose expected testimony was "highly material" to a central issue in the case, even though they were willing to appear at trial, to preserve their testimony in the event that the witnesses changed their minds. 1 F.3d at 1557. Under the unusual circumstances of this case, Mr. Jefferson submits that the interests of justice require that he be permitted to depose Mrs. Abubakar, whose expected testimony is highly material to a central issue in the case, even though she is subject to a trial subpoena, to preserve her testimony in the event that she does not appear.

C. Conclusion

For the reasons set forth above and in his motion, Mr. Jefferson respectfully submits that the Court should grant his motion and enter an order (1) permitting him to serve Mrs. Abubakar by alternative methods as proposed by the government, and (2) permitting him to take the deposition of Mrs. Abubakar in Europe pursuant to Rule 15(a).

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 14th day of January, 2009, I electronically filed the foregoing reply with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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